UNIVERSITY OF
TORONTO
FACULTY OF LAW

PROPERTY LAW: 2007-2008

VOLUME TWO

J. Phillips
Faculty of Law
University of Toronto

PROPERTY LAW: 2007-2008

VOLUME TWO

J. Phillips
Faculty of Law
University of Toronto

TABLE OF CONTENTS - VOLUME TWO

CHAPTER SIX

EASEMENTS

A) INTRODUCTION

An easement is one of the class of rights in land known as "incorporeal hereditaments", or sometimes as "servitudes". It is essentially the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration

Imagine that A owns land bordered on three sides by woods, and on one side by a road. A wishes to sell part of the land, and B wishes to buy part of it. But A wants to sell a part that does not border on the road. B is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods - assuming that B has a right to go through the woods. If not, a helicopter will be required. The solution is simple - as part of the agreement by which she buys the land from A, B also obtains the right to cross A's land to get to the road. Presumably A will extract some price for this, some increase in B's purchase price, but it matters not to the law whether payment is given, only that the agreement has been made.

Easements are a relationship between two parcels of land - the dominant tenement and the servient tenement. In this example the land that is reached by crossing the other parcel is the dominant tenement; the land that is crossed is the servient tenement, it serves the dominant tenement.

If an easement has been created by one of the methods acceptable to the law (an issue dealt with in sections (c) and (d) of this chapter), and if the right granted meets the necessary test as being the kind of thing allowed by the law of easements (an issue discussed immediately below in section (b)), then it will generally run with the land, be a part of title. That is, if the easement is created during the period that A and B own the two pieces of land, and A then sells to C and B sells to D, C and D are in the same position as landowners as A and B were. This is what makes the easement a property right, for the original agreement between A and B could be enforced merely as a contract, as could any other agreement between them. But if the particular right created by the initial contract is an easement, it becomes part of the title, part of the fee simple that each successor owner has, it has an existence independent of the identity of the owner of the land at any given time.

NOTES

1) *Re Lonegren et al and Rueben et al* (1988), 50 D.L.R. (4th) 431 (B.C.C.A.) concerned the requirement that the dominant and servient tenement be owned by different persons. At the time of the creation of the easement one tenement was owned by Mr and Mrs Reuben as joint tenants, the other by Mr Reuben and another person as tenants in common. Successors-in-title to the servient tenement argued, unsuccessfully, that this was tantamount to there not being different owners of the two tenements. The trial judge had held that ownership was sufficiently separate, and the Court of Appeal agreed, although without reasons.

2) In *Ellenborough Park* the court asks whether the easement is "inconsistent with the proprietorship or possession of the alleged servient owners". What policy considerations inform this part of the test for an easement?

3) A owns a piece of waste ground, and agrees to sell half to Wal-Mart. Wal-Mart intends to use the land for a new store, and makes an agreement with A for the use of A's retained part of the waste ground as a parking lot. Over the next couple of years about 100 cars a day are parked on A's land, the parked cars using about half of the area. A then sells to C, who tells Wal-Mart it cannot use the parking lot any longer. Wal-Mart claims it has an easement for parking. What arguments would you use on C's behalf?

CHAPTER SEVEN

RESTRICTIVE COVENANTS

A) INTRODUCTION

Restrictive covenants are, like easements, a form of incorporeal hereditament. Begin with the notion that a covenant is an agreement under seal, one contained in a deed. In the context of real property law, it is an agreement by which one person agrees to do something, or not to do something, with his or her land, for the benefit of the other party. As with an easement created by express grant, we can use contract law to say that the terms of the covenant are enforceable as between the original parties. But, again similarly to an easement, the issue is when the terms of the covenant become attached to the land, as part of title to it, and are therefore enforceable by and against successors in title to the original contracting parties. That is, at what point will the law consider the covenant to be an interest in land.

An obvious question which will occur to you at this point is - what is the difference between covenants and easements? I am not going to answer this fully at the moment, because the entire answer requires us to understand the whole chapter. But for the present you can usefully think of a covenant as (a) requiring an owner to do something or not do something with his or her own land, whereas an easement gives its holder the right to go onto another's land, and (b) as an agreement containing terms and conditions that would not amount to an easement by the characteristics outlined in *Ellenborough Park* or because of the restrictions on negative easements noted in *Phipps* v. *Pears*. There are other differences, but the point is that covenants principally affect servient land, while easements only do so inferentially, and that covenants are potentially much wider in scope than easements - although there are limits on which type of covenants can go with title. We will see that covenants are much more difficult to enforce against successors-in-title than easements, and thus you would never attempt to argue that something like a right of way was a covenant.

A paradigm restrictive covenant (that's a term of art which will be explained later) would be a limit on the kind of development that one land owner could undertake. That is, you own land and sell half of it off. You know the purchaser is a yuppie stockbroker who would want to build a large, ugly house and paint it pink. You insert

a clause in the conveyance that would prevent this. Restrictive covenants are therefore a form of private zoning. Despite the introduction of public zoning they remain part of the law and are widely used. They are used for a variety of ends, which will appear more or less acceptable depending on one's political perspectives. They have been used in the past to enforce racial segregation - refer back to *Re Noble and Wolf.* Generally, they "can be useful instruments in the hands of a 'nimby' ": Ziff, *Principles of Property Law*, p.360. Later in this chapter, section F, we will look more closely at one modern type of covenant - the conservation covenant.

Covenants and easements are often used together, and indeed the former can be necessary to make the latter possible. For example, in the *Ellenborough Park* case, as well as granting the residents the right to use the park as a garden, the deed also contained a covenant by the original vendors "against building on the park and to the effect that the park should at all times remain as an ornamental garden".

At this stage we need to introduce some terms. The covenantor, the person who agrees to do something or not to do something, has what is called the burden of the covenant. The covenantee, the person for whose benefit the covenant is made, has what is called the benefit of the covenant. Enforcing the burden and being able to enforce the benefit against or for a successor in title to the original party is known as running the burden or the benefit of the covenant.

Let us now return to the situation with which we began - two persons make a covenant related to land which is enforceable between the original parties. When will it be enforceable for and against successors-in-title? This question brings a rather complicated answer, for the rules on running covenants are "unnecessarily complex and occasionally illogical": Ontario Law Reform Commission, *Report on Covenants Affecting Freehold Land*, 1989, p. 1. We will begin with the common law rules, and then deal with equity.

NOTES

1) We will return to the question of whether or not the burden of the covenant should run at common law later in this chapter. It is necessary to first understand when and why the burden of the covenant will run in equity.

2) You might have some doubt as to correctness of the decision in *Austerberry* that the covenant there did not touch and concern the land. The meaning of this term is not easy to grasp. The leading definition is from *Rogers* v. *Hosegood* [1900] 2 Ch. 388: "the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land". That is, the covenant must relate to the *use* which may be made of the servient land and such limitation on use, or requirement of particular use, must affect the dominant land as land, must not be personal. We will return to the meaning of "touch and concern the land" later in this chapter.

3) In *Smith et al* v. *River Douglas Catchment Board,* [1949] 2 K.B. 500 (C.A.) various landowners agreed to contribute towards riverbank work if the Board agreed to maintain the banks. When the bank later burst successors in title to the original landowners sued on the covenant. The court held that the benefit of the covenant could run since it touched and concerned the land. You should note that in this case the Board had no land of its own; thus it is not required to run the benefit that there be a dominant and servient tenement. As we will see, this is a requirement for running the burden in equity.

C) RESTRICTIVE COVENANTS: RUNNING THE BURDEN IN EQUITY

INTRODUCTION

We have seen that the common law rule is that the burden of a covenant will not run. But equity will run the burden in certain circumstances. This is where the term of art "restrictive covenants" comes in. A restrictive covenant can be defined as a covenant that equity will enforce against successors in title to the original covenantor.

The rules on running the burden of covenants in equity are complicated, and that complexity is exacerbated by the fact that there are also requirements for running the benefit in equity. In addition, you will not find complete agreement among either judges or scholars on how best to organise all of the rules. What follows is our view of how best to do this.

There are four principal requirements to be met before equity will run the burden of a covenant, as follows:

1) The covenant must be negative in substance; hence the term "restrictive" covenant. It may be positive in form, as the covenant is in *Tulk* v. *Moxhay:* "keep and maintain the said piece of ground ... in an open state, uncovered with any buildings". But this is negative in substance - it is a prohibition on development.

2) There must be a dominant and servient tenement.

3) The covenant must touch and concern the land of the covenantee.

4) Successors-in-title to the covenantor must have notice of the covenant.

The first case in this section, *Tulk* v. *Moxhay*, is considered to be the origin of the rule that equity will run the burden of some covenants. Ask yourself what the basis of the decision is in *Tulk*, and which of these requirements it appears to lay down?

NOTES

1) *Galbraith* tells us that a restriction on who may buy the servient land does not relate to the dominant land as land, it was personal. *Austerberry* v. *Oldham*, above, held that a covenant to repair a road was for public benefit, and does not touch and concern the land of particular landowners. In *Zetland* v. *Driver* [1939] Ch 1 (C.A.) the covenant was to the effect that no alcohol be sold on the servient land and that "no act or thing shall be done or permitted which in the opinion of the vendor [dominant tenement owner] would be a public or private nuisance or prejudicial or detrimental to the vendor or owners or occupiers of any adjoining property or to the neighbourhood". The servient tenement owner argued that this did not touch and concern because it was made not only for the dominant tenement but also for the neighbourhood as a whole. Farwell J. rejected this contention, holding that "the paramount purpose" of the covenant "is to benefit and protect the unsold land of the vendor.... [n]othing which would be a nuisance or annoyance to an adjoining owner of the neighbourhood is within the covenant, unless it is also injurious to the unsold land of the vendor".

2) The most common form of restrictive covenant is a limitation on development, and therefore one can assume that such a covenant touches and concerns the land. But how much land? In *Earl of Leicester* v. *Wells-next-the-Sea Urban District Council* [1973] 1 Ch 110 the court accepted that restrictions on a 19-acre plot could benefit a 32,000 acre estate. In *Re Ballard's Conveyance* [1937] Ch 473 building restrictions on an 18-acre plot were held not to be enforceable in favour of an estate of 1,700 acres. The court stated: "it appears to me quite obvious that while a breach of the stipulations might possibly affect a portion of that area in the vicinity of the applicant's land, the largest part of this area of 1,700 acres could not possibly be affected by any breach of any of the stipulations".

3) In *Jain* v. *Nepean* (1989), 69 O.R. (2d) 353 (H.C.J.) a municipality sold lots in an industrial park. Wishing to encourage development and not speculation, it inserted covenants requiring the purchasers to build by a certain date, which were said to be for the benefit of other lands of the municipality. They were held to be positive covenants, but in addition it was said that they did not touch and concern any land retained by the municipality, but benefitted the municipality qua municipality. They were an adjunct to municipal development policy.

D) RESTRICTIVE COVENANTS: RUNNING THE BENEFIT IN EQUITY

INTRODUCTION

As a restrictive covenant is an equitable interest in land, equity also devised rules for when it would run the benefit of one. That is, one cannot rely on the common law rules to run the benefit.

The principal rule that must be met before the benefit of a covenant will run with the land of the covenantee in equity is that it must be intended to do so, that "the assignee must demonstrate entitlement to the benefit". If he or she cannot, the covenant is seen as a purely personal one to the original covenantee. Some authors state that it is also necessary for the covenant to touch and concern the land of the covenantee, but I have included that among the requirements for the burden running discussed in the previous section.

There are three ways to establish sufficient intention, to "demonstrate entitlement". First, the benefit can be annexed to the dominant land by express language in the covenant. One can use the term "annexed', or state that the covenantee makes the covenant as owner of the lands. See the covenant reproduced in section F below.

Second, the benefit can be assigned, as can any contractual right in equity. This must be expressly done at the time of the transfer of the land by the covenantee and, as with annexation (see the *Sekretov* case below), Canadian law likely requires clear language as to the land being benefitted.

Third, both the benefit and the burden will run for restrictive covenants contained in what is known as a "building scheme" or a "scheme of development". The builder of a sub-division may want to impose limits on uses as lots are sold off, both to keep other lots attractive and to be able to offer consistency in the type of neighbourhood to prospective purchasers. But the restrictive covenant rules create problems here. For one thing, the developer will be the contracting party whereas the real covenantees are the other lot owners, present and future. For another, each lot owner really has both benefits and burdens in relation to all other owners. None of these problems are insurmountable, but they make the situation "unwieldy", and getting around these problems requires that "a careful pattern be followed involving the granting of reciprocal covenants on each initial sale": Ziff, *Principles of Property Law*, p. 373. The

common law thus made an exception of building schemes and allowed common covenants to run for and against all lots provided four conditions were met: (i) all lots must derive title from a common vendor; (ii) there must be a clear intention that the covenants apply equally in benefit and burden to all lots; (iii) the geographical area covered by the scheme must be clearly defined: (iv) all purchasers must buy lots with the expectation that the covenants were to be enforceable against all other purchasers.

The requirements of a common vendor and of clear definition of the area covered were recently confirmed in *Berry et al* v. *Indian Park Association* (1999) 174 D.L.R. (4th) 511 (Ont. C.A.). A rural community development was built in 1974 and 1975, with a variety of covenants registered. In 1988 the development was added to by buildings on adjacent lands, constructed by another developer. That developer, and the purchasers of the new houses, agreed to the restrictions, but following a dispute the Court held that the original covenants were not enforceable against the owners of the later buildings. There was no common vendor, and the new houses were not part of the original scheme, because they were not contemplated in the mid-1970s.

The *Sekretov* case below is an attempted annexation case. The issue is whether the benefit can be annexed to the dominant land if the land to be benefitted is not delineated in the covenant itself. In *Galbraith* v. *Madawaska* Judson J. also dealt with this question. After discussing the "touch and concern" issue (above), he stated:

There is nothing in the conveyance from the club to Mrs. Firth which attempts to annex the benefit of the covenant to any land retained by the club. Further, there is no evidence anywhere in the record to indicate whether the club had any such land capable of being benefited. The grantee simply covenants for herself, her heirs, executors, administrators and assigns, with the grantor, its successors and assigns, to the intent that the burden of the covenants should run with the lands during the corporate existence of the club but nothing is said about any other lands. This fails to meet what I think must be regarded as the minimum requirements that the deed itself must so define the land to be benefited as to make it easily ascertainable....

G) NOTES

1) As noted earlier, the content of covenants, the purposes they are used to achieve, can vary greatly. Many seek to preserve the look of neighbourhoods, or to conserve green space. While it is no longer possible to directly restrict who may buy land, increasingly covenants are used to do this indirectly. The study of their use in Kitchener from 1951 to 1991 discussed in Ziff, *Principles of Property Law*, p. 359, shows a steady rise in the use of covenants which limit or prohibit the building of affordable housing or of residences other than those for single family units. Other covenants have sought to prevent the building of group homes for schizophrenics and the like - see the examples and cases cited in Ziff, p. 360.

An increasingly popular form of covenant is the so-called "conservation covenant". Of course many of the covenants we have looked at seek to conserve natural areas or artificial green space. But if one wanted to preserve a large area, perhaps the whole of one's land, there are difficulties given the common law rules that make a covenant a relation between parcels - there must be a dominant tenement, and the covenant must touch and concern some benefitted land. Somebody who wished to preserve a large tract could get around the covenant rules by selling the land to the government for a park, or to a conservation organization, and attach a condition. But legislation in many provinces now also permits the owner to keep the land while granting a conservation covenant to the government or such an organization, which is registered against title. The landowner still has the land, and undertakes to use it only in certain ways. The covenant holder has the power to enforce the covenant.

Conservation covenants get around the need for a dominant tenement because the legislation makes them an exception to the common law rules. It also allows for the enforcement of positive obligations. Ontario's *Conservation Land Act*, R.S.O. 1990, c. C.28, as am., permits an owner to enter into a covenant with a "conservation body" for "the conservation, maintenance, restoration or enhancement of all or a portion of the land or wildlife on the land". A "conservation body" can be a government agency, a municipality, an Indian band, a conservation agency, or a non-profit corporation. Other statutes permit conservation covenants for agricultural land, forests, wildlife habitat, etc.

2) An example of a restrictive covenant is reproduced below. It is one attaching to the title of a family cottage property of a student in Property I, 1995-1996. A few

comments on it might be useful. First, note the language of the initial, granting, clause which indicates that it is part of a sale of land and attempts to annex the covenant to the land - "with the intention that the same shall run with the lands and be binding upon all subsequent owners..." This is sufficient to annex the benefit. Had the final quoted phrase not been there, with the clause ending at "assigns", it might not be annexed. It is also sufficient to indicate that the covenant is not personal to the covenantee, one aspect of the requirement that the covenant touch and concern the land of the covenantee.

Second, note the substantive clauses, one through four. The first, second and fourth are typical negative covenant terms - restrictions on what may be done with the land. The third substantive clause is interesting. An argument can be made that "neat design" lacks sufficient certainty. We did not deal with it (except earlier for *Re Noble and Wolf*) but there is a certainty requirement in covenants which is nowhere near as strict as that for conditions. It is more akin to the general certainty of terms requirement in contract law (which of course you have done). But even under a looser certainty test there might be problems with "neat design". "Good appearance" may raise a certainty problem as well, and in addition it may run the risk of being positive in substance. If it means merely "initial" good appearance that's acceptable, but if it means "keep up" the appearance it would be in substance a positive obligation to maintain. Also on the positive/negative distinction, the $800 requirement looks positive but would almost certainly be considered negative. Nobody is required to spend $800; rather, any house built must cost that.

The last clause was originally the third one, but was crossed through, and the numbers of what are now the third to fifth clauses were altered to keep the numerical sequence. The *Conveyancing and Law of Property Act* amendment which banned such covenants came into force on March 31, 1950, and this deed was registered on May 12, 1950. The lawyer must have known there was a problem with clause 6, else why move it to the end? Yet I am not sure what he or she thought would be gained by doing this. My best guess requires reference to the language of the statutory section. It says that discriminatory covenants "that but for this section would be annexed to and run with land" are "void and of no effect." And you will note that in the fifth clause of the covenant it says that any future conveyance of the lands will be subject to "the above restrictions" - that is, not number 6. Thus number 6 is not intended to run with the land, it is intended to be merely a personal covenant. Would enforcement of such a personal contract be contrary to public policy, either on general grounds or as an attempted end-run around the statute?

REGISTERED MAY 12, 1950

AND THE GRANTEES for themselves and their heirs, executors, Administrators and assigns, hereby Covenant, promise and agree to and with the said Grantor and his heirs, executors, administrators and assigns with the intention that the same shall run with the lands and be binding upon all subsequent Owners or Occupants thereof.

FIRSTLY: That the said lands shall be used for Residential Purposes only.

SECONDLY: That during a period of twenty years from the date hereof only one detached dwelling house may be erected and permitted to stand at any time on each lot as subdivided and laid out on the Registered Plan.

THIRDLY: That any dwelling house, private garage or other outbuildings erected on the said lands shall be of neat design and good appearance and that no dwelling house shall be erected or placed on the said Lands costing less than Eight hundred dollars exclusive of any garage or other outbuildings.

FOURTHLY: That no part of any building or erection of any kind other than fences or ornamental arches, pergolas or other similar structures shall be placed or erected upon the said lands within a distance of Eight feet from the limits of the parcel, other than the shore line.

FIFTHLY: That any Conveyance of the said lands hereafter made shall be subject to the above restrictions which shall be provided for and insured by Covenants in the above terms in any such deed made by and on behalf of the Grantees and their heirs executors Administrators and assigns and all successors in title and such Covenants shall be made to run with the said lands.

SIXTHLY: That no sale of the said lands or any part thereof shall be made at any time, to any person who is not a white Gentile nor to any Company or Corporation controlled or managed by other than white Gentiles.

CHAPTER EIGHT

PROPERTY, POLITICS, THE CONSTITUTION AND THE STATE

A) INTRODUCTION

It is a commonplace of political philosophy that the western liberal tradition places great emphasis on the freedom of the individual. This freedom is often discussed in terms of freedom from control by others, especially the state. It is also often contended that private property serves a crucial role in protecting and enhancing such freedom. Professor Jeremy Paul, for example, states that property acts "as protector of individual rights against other citizens and as safeguard against excessive government interference": "The Hidden Structure of Takings Law", (1991) 64 *Southern California Law Review* 1393. The same point was made many years ago by Morris Cohen, one of the leading legal realists, who argued that private property gives those who have enforceable claims to resources power over their own lives and a measure of power over the lives of others: "Property and Sovereignty", (1927) 13 *Cornell Law Quarterly* 8.

The enhancement of individual liberty is therefore often cited as a justification for private property in general. More particularly, it also serves as an argument for putting into private hands as many as possible of the strands in the bundle of rights that property represents. But no society places the whole bundle in individual hands, for all recognise that to one degree or another individual property rights must give way to society's collective goals. This is most obviously achieved by taxation, but there are a host of others ways in which this is also done, some of which we have discussed above - see the debate over property and discrimination. The first substantive section of this chapter examines another area where public goals and private rights, or perhaps the private rights of the few and the private rights of the many, collide - takings.

The second section of this chapter examines a somewhat different, but related, aspect of the relationship between property and the state - the extent to which citizens should have some entitlement to a minimum level of property. This introductory note began by talking about property as providing freedom from government interference. But it has long been recognised that this negative liberty is not the only kind of liberty. There is also such a thing as positive liberty, the freedom to live a full life, which may

require the state to provide the means to do so. The second substantive section examines how a political theory that stresses "freedom to" might alter current conceptions of the relation between property and the state.

****

B) FREEDOM FROM: THE LINE BETWEEN REGULATION AND TAKING

THE UNITED STATES CONSTITUTION

The first two "takings" cases are from the USA. The United States Constitution contains a specific protection for property. The fifth amendment reads in part: "...nor shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". This originally applied only to the federal government, but it was extended to the states, in part explicitly and partly by implication, by the fourteenth amendment (1868). In short, the state may take property from the citizen provided that this is done for a public purpose, such as a highway, and provided fair compensation is paid.

We are not concerned here with the intricacies of the law relating to what a public purpose is or to how compensation is calculated. The *Pennsylvania Coal* and *Keystone* cases are about whether the government has taken property at all. If it has not, no compensation need be paid. This may sound like an easy question, but the cases show that it is not. What causes the difficulty is that almost any regulation by government of any aspect of social or economic life will affect in some way the property rights of some person or persons. Anti-pollution laws, for example, limit what uses an owner can make of land and in that sense remove a strand from the owner's bundle of rights. But this is not considered a taking - or at least not generally so, for one can find, in the US in particular, people who say that practically any regulation is a taking.

But assuming that "all regulations are takings" is too extreme a position, it is also the case that most people would agree that the converse - no regulations amount to takings - is also too extreme. This position would state that the government does not "take" from the citizen unless it acquires title to land or personal property. But this would permit the state to prohibit every use, and thereby render ownership worthless, without paying compensation.

So the question in the cases is - where between these two extremes is the line to be drawn? In reading these cases do not be confused by the term "police power". It is a term of art in US constitutional law meaning the power of the states to regulate private conduct in the interests of public health, welfare and safety.

The area of regulatory takings is a large and complicated one in the US, and it is not my purpose to cover it comprehensively or indeed to provide an up-to-date analysis of it. The two cases extracted are here fore different reasons. *Pennsylvania Coal* is here because it is considered the origin of the modern, twentieth-century approach to regulatory takings, the case that signalled a more interventionist approach by the US Supreme Court. As Justice Stevens says in 1987 in *Keystone*, "[t]he two factors that the Court considered relevant [in *Pennsylvania Coal*] have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land' ".

The second case, *Keystone*, is included in part because it obviously involves a revisiting of essentially the same issue that was at stake in *Pennsylvania Coal*. More importantly, it demonstrates a sharp disagreement within the US Supreme Court over when the court ought to require compensation for regulation, a disagreement in large measure based upon how the two camps decide to define "property" for these purposes. Hence the issue that we considered in chapters 1 and 2 - what do we mean by property - turns out to be crucial. For the majority the property held by the coal company is all of the coal deposits available to it. They are thus able to say that the regulation affects only a small part of the complainant's property. The minority define property as each individual strand in the bundle of rights; they are thus able to say that the regulation "takes" all the property in the strand - both all of the 27 million tons and all of the "support estate". There are clearly other differences between the two judgments also, especially in the emphasis each would give to the public interest.

When reading the *Keystone* case do not worry about the term "support estate." Pennsylvania is unique among common law jurisdictions in recognising three estates - surface, mineral, and support. It is not uncommon to separate the first and the second, to give mineral extraction rights to a person other than the fee simple holder, but normally the first and the third go together. The holder of the right to use the surface also has the right to have it supported by any underground activity. But because, as *Pennsylvania Coal* tells you, in the nineteenth century coal operators sold land above which they were working to individuals, and because the contracts of sale

included a term exempting the coal operator from any liability should the mining cause the surface to subside, the courts recognised the coal operators' interest as a "support estate." That is all you need to know about it, but note that it does become important because the dissenting judgment depicts the support estate as a separate interest in land that is effectively expropriated by the regulations at issue.

****

PENNSYLVANIA COAL COMPANY V. MAHON ET AL, 260 U. S. 393 (1922)

Mr. Justice Holmes delivered the opinion of the Court. This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights they were taken away by an Act of Pennsylvania, approved May 27, 1921, P. L. 1198, commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought, but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This process I have already distinguished from zoning, the broad legislative assignment of land use to land in the community. It is also to be distinguished from regulation of specific activity on certain land, as for example, the prohibition of specified manufacturing processes. This type of regulation is akin to zoning except that it may extend to the entire community: see Re Bridgman and City of Toronto, [1951] 3 D.L.R. 814 at pp. 816-7, [1951] O.R. 489 at p. 491, for an example of such regulation. Here, the action taken by the government was to enhance the value of the public park. The imposition of zoning regulation and the regulation of activities on lands, fire regulation limits and so on, add nothing to the value of public property. Here the government wished, for obvious reasons, to preserve the qualities perceived as being desirable for public parks, and saw the mineral operations of the respondents under their 1937 grant as a threat to the park. The notice of 1978 took value from the respondents and added value to the park. The taker, the government of the province, clearly did so in exercise of its valid authority to govern. It clearly enhanced the value of its asset, the park. The respondents are left with only the hope of some future reversal of park policy and the burden of paying taxes on their minerals. The notice of 1978 was an expropriation and, in my view, the rest is part of the compensation assessment process.

****

NOTE: Estey J.'s judgment is the majority in Tener. Wilson J., for herself and Dickson C.J.C., concurred in the result. She first held that the interest in question was a *profit a prendre*, the right to go onto another's land and take "therefrom a profit of the soil". (A *profit a prendre* is a form of incorporeal hereditament, like an easement). In this case the profit comprised "both the mineral claims and the surface rights necessary for their enjoyment". She stressed that the holder of the profit does not own the product of the soil while it remains in the soil; he or she owns only the claim, the right to exploit the product, to sever it from the soil. She then noted that the regulation prevented the holder of the profit from going onto the land and severing the minerals. After a review of the legislative scheme, she found that the government action constituted an expropriation as that term was defined in the *Park Act*. That is, "the absolute denial of the right to go onto the land and sever the minerals so as to make them their own deprives the respondents of their profit a prendre. Their interest is nothing without the right to exploit it" because the minerals in the ground did not belong to the holders of the claims: "Severance and the right of severance is of the essence of their interest". In coming to this conclusion she rejected an argument that the crown's action was merely regulation, akin to zoning. While giving or refusing a licence might be often so characterised, "it cannot be viewed as mere regulation when it has the effect of defeating the ... entire interest in the land". That is: "Without access the respondents cannot enjoy the mineral claims granted to them in the only way they can be enjoyed, namely by the exploitation of the minerals .... The reality is that the

respondents now have no access to their claims, no ability to develop and realize on them and no ability to sell them to anyone else.... They are worthless".

On the issue of whether the crown had acquired what had been taken, Wilson J thought that *Manitoba Fisheries* was the "complete answer". Just as Manitoba Fisheries' customers had been forced to do business with the new crown corporation, thereby effectively transferring the former's goodwill, so here, by depriving the holder of the profit of the right to go onto the land and sever the product from it, "the owner of the fee [the crown] has effectively removed the encumbrance from its land". The doctrine of merger - whereby the lower interest (the profit) is absorbed into the higher (the fee simple) "operates so as to make the respondents' loss the appellant's gain". In short, when it granted the mineral rights the government had granted a right to use the surface; when it enacted the regulation it had not only removed that right, it had effected a reversion of the right to itself as owner of the fee simple. It had removed a burden on its own land, and that burden was the very property which had been taken from the citizen.

NOTES

1) In a variety of cases provincial courts have dealt with claims for compensation consequent on economic or land use regulations. Some, if not all, of these seem at time to be at odds with the Supreme Court's judgments. A few of these are discussed here.

In *Home Orderly Services Ltd* v. *Government of Manitoba* (1987), 49 Man. R. 246 (C.A.) the plaintiff was in the business of providing services to the partially disabled. Many of the recipients of those services had the fees paid by the government. In 1984 the government decided to provide the services itself for free, thereby effectively destroying Home Orderly's business. The company sued for compensation, citing *Manitoba Fisheries*. The trial court struck out the Statement of Claim as disclosing no cause of action. It stated that the Government was merely providing a competing service, which happened in this case to render the private service completely unprofitable, but it had not prevented Home Orderly from operating. The Court of Appeal upheld this decision, but principally on the ground that Home Orderly had always been substantially dependent on the state for its survival. The Court of Appeal stated that ordinarily the government must compensate for a takeover or the destruction of a private commercial venture. Are both judgments consistent with *Manitoba Fisheries* et al?

In *Keystone Bingo Centre Inc.* v. *Manitoba Lotteries Foundation et al* (1989), 48 M.P.L.R. 41 (Man. Q.B.) the plaintiff operated a commercial bingo hall until regulations made by a licensing commission effectively put it out of business. Compensation for redundant physical assets was paid, but the court rejected a claim for loss of business. Following *Home Orderly*, above, the court stated that while compensation would be ordered when government destroyed or damaged private enterprise, this was a case where the enterprise only operated at the sufferance of the government which had the right to set licensing terms.

In 1980 The City of Winnipeg designated the Fort Garry Hotel as an historic building. In 1983 the city refused a request from the hotel's owner for it to be delisted. Listing, among other things, prevented demolition of the building and limited the alterations that could be made to it. After years of losses, the owners sued for compensation for loss of value of land and losses incurred in the running of the hotel. The court, in *Harvard Investments Ltd.* v. *City of Winnipeg* (1994), 54 L.C.R. 163 (Man. Q.B.), summarised one of the owner's arguments thus: "The listing, Harvard argued, was tantamount to an expropriation in that it deprived Harvard of certain of its rights of

property and ownership to the hotel by converting such rights and ownership to the City. An example of such deprivation ... was the right to demolish the hotel". The trial court's response to this argument was as follows:

"The listing ... was not a statutory or regulatory taking as such. It did not deprive the owner ... of its title to and possession of the land. It did, however, prevent the owner ... from doing with the hotel building as it saw fit.... While this may be, as Harvard argued, an effective deprivation comparable to a taking of the owner's equity in the land, it is not, in my opinion, compensable.... I am in agreement with the City's position that the listing and designation of the hotel was merely an exercise of a regulatory power similar to the regulation of the use of lands through a zoning by-law. While it may have the effect of limiting and curtailing the use of the lands, it does not amount to a taking nor does it vest any rights to the property in the City".

Harvard appealed. Two judgments were written in the Court of Appeal. Philp JA, for himself and Kroft JA, stated that: "There was a 'taking away' when the hotel was listed ..., in that the effect of the listing was to preserve in perpetuity the exterior of the hotel and certain described interior elements. But there was evidence that the listing, and the hotel's historic elegance which the listing preserved, were a marketing tool of some significance to the hotel's operation. And ... the City acquired nothing; nothing was added to the value of public property". As a result, listing was "akin to the limitations that zoning and planning regulations may impose upon a property." Philp JA cited *Tener* for the proposition that to constitute a taking action short of expropriation of title must add value to public property.

Having rejected Harvard's claim, Philp JA nonetheless went on to make some general comments. He stated that he was not holding that an historic listing "will never give rise to a claim for damages". That is, if a listed building "becomes commercially impracticable" either because of the listing, or as a result of a combination of that listing and other factors, such facts "may amount to a taking and entitle an owner to compensation".

Twaddle JA delivered a separate concurring opinion, discussed in *Mariner Real Estate*, above. He began by noting that in both *Manitoba Fisheries* and *Tener* the Supreme Court had approved the *De Keyser's* rule, and had also "offered guidance as to what constitutes a taking". He thought this guidance was that there were "two elements to a taking". First, "the acquisition of an asset by the authority involved", and, second, "the complete extinguishment of an asset's value to the owner". Neither of these

elements was present in the case before him. First, the hotel was put out of business more by mismanagement than by the historic designation, and the city had not acquired the hotel. Twaddle JA then went on to say that "if an owner is deprived of the right to demolish a building by reason its historical designation, the owner may well have a claim for compensation. It would, however, be necessary for the owner to establish the building to be virtually useless ... and its value thus completely extinguished". In these circumstances the first of his two elements would also be met: "if such circumstances had been proved to exist, my own view is that a notional taking could be deemed to exist as the city would have preserved a monument for the benefit of its citizens at the cost of a private owner. That would be particularly so where, as in this case, the city subsequently acquired the property on a tax sale. It could then be said that the tax sale, and the city's acquisition of the property, flowed from the historical designation which reduced the value of the property to nil and made the payment of real property taxes pointless. Conceptually, then, I see the historical designation of a building as having the potential of being an expropriation, but only in the most limited of circumstances".

2) Remember that in chapter two we looked at arguments that the courts should find that there were property rights in certain intangibles not previously recognised as conferring such rights. The following article from the *Globe and Mail*, 24 March 1998, deals with the relationship between the creation of new property rights and possible claims for compensation for expropriation:

At the Great Canadian Superstore in Langley, B.C., the recent price of four litres of 2% milk was $3.69. Across the U.S. border in Blaine, Wash., the Canadian dollar equivalent price was $2.60. The milk price gap, a 40% premium paid by Canadians, is the final insult of the great consumer ripoff known as the national supply management system, an elaborate structure of controls, regulations, quotas, and back-room deal making that Ottawa maintains to limit the supply of agricultural output and keep prices high. Under supply management, protected by import restrictions and high tariffs, Canadians pay billions of dollars more each year for scores of products, from cheese to chickens and eggs, with the money flowing mostly from consumers to farmers. Now, behind the scenes, an even more twisted distortion is developing, one that could cost consumers and taxpayers billions.

As the prospect of ending supply management grows under pressures created by international trade agreements, farmers are likely to begin claiming compensation for their losses. "The effect of supply management has been to create a set of property rights related to the ownership of quota", University of British Columbia professor William Stanbury said in a paper on a looming property rights debacle in the supply management sectors. Quota is

the right to sell a farm product such as milk through a supply management board. In milk alone, Prof. Stanbury calculates that at current prices for quota - the amount of money a farmer must pay to purchase the right to produce a quantity of milk - the potential total value of "property rights" claims by farmers could exceed $11 billion. The Stanbury paper was one of more than a dozen delivered over the past weekend at a conference put on by the Canadian Property Rights Research Institute, a Calgary organization dedicated to championing property rights across Canada. For the most part, property rights activists focus on how governments take away property rights. Other papers examined how rights have been systematically diminished, with case studies on Ontario's rent control regime, the Canadian Wheat Board, the environment, intellectual property, and gun control.

Prof. Stanbury's paper tackled the opposite, but no less alarming problem of how governments create artificial property rights by regulation, and then how the owners of those rights are likely to claim compensation if the rights are removed. In farm product supply management, the value of these rights - essentially the right to gouge consumers - has skyrocketed. The milk quota is the right to produce one kilogram of butter fat daily. The latest March price for quota traded on the Dairy Farmers of Ontario quota exchange was $16,501. Lower prices exist in Manitoba and the western provinces.... Using national averages, Prof. Stanbury calculates that ... the total value of the milk quotas is $11.8 billion. The numbers are staggering. On a per cow basis (there are about 1.1 million in the country) the value of quota is $10,161. This compares with the value of cows, about $1,000 each.

On a per farm basis (average 49 cows for each farm), the value of quota is about $497,000. At that price, the value of quota is about equal to the average cost of the land, buildings, equipment and cows for an average 49 cow operation. The value of quota has fluctuated widely over the past two decades, but a recent analysis of price performance shows that milk quotas have outperformed the Toronto Stock Exchange composite index.... The quota values have real consequences. Banks grant farmers loans secured by quota. Farmers and investors have real money at stake. The result is the creation of what Prof. Stanbury describes as a "form of property rights" that now has large economic value, and an army of "owners" with a strong interest in lobbying government to maintain and protect those rights. "If supply management were abolished and all tariffs and quotas were removed, the investment in quota would disappear." The question posed by Prof. Stanbury is whether these rights should be protected: "What is an ethical approach to the economic value of property rights or quotas created by government at the behest of a narrow interest group, and which are owned by the members of the group?" He doesn't provide an answer. It shouldn't be too difficult, however, to see that there are no true property rights to protect here. Ethically, as well as economically, supply management is a cartel put in place by government to restrict supply and rob consumers to pay the farmers. Removing the system would restore the market rights of consumers, which have been appropriated by the cartel for the past 25 years.

3) NAFTA poses a challenge to the Canadian approach to takings law identified here. Article 1110 of NAFTA states: "No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment except (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law...; and (d) on payment of compensation."

It is not yet clear what interpretation will be given to this clause. In one 2000 case, *United Mexican States* v. *Metalclad Corp*, a tribunal constituted under NAFTA's dispute resolution procedures granted damages of over $16M to an American corporation whose development opportunities were stymied by Mexican environmental regulations. In coming to its conclusion the Tribunal defined "expropriation" in Article 1110 to mean "the open, deliberate and acknowledged taking of property, as well as overt or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state". On an application for judicial review (*United Mexican States* v. *Metalclad Corp* (2001), 89 B.C.L.R. (3d) 359 (S.C.) - the place of arbitration was designated as Vancouver) Tysoe J. of the B.C. Supreme Court noted:

"The tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority".

The court did not comment further on that definition, however, as it was a question of law which it did not have jurisdiction to interfere with under the international arbitration rules.

CHAPTER NINE

ABORIGINAL RIGHTS

A) INTRODUCTION

This chapter provides a necessarily brief introduction to the subject of aboriginal rights in land. The issue of aboriginal rights has in the last two decades become an increasingly important legal and political one in Canada; it has also received much attention in recent years in the courts and legislatures of Australia and New Zealand and, to a lesser extent, in the USA.

The chapter begins with a review of the leading aboriginal title cases from the 1970s and 1980s, which are about the common law of aboriginal title. They also introduce us to the idea that the crown stands in a fiduciary relationship to aboriginal peoples. Thereafter we look at aboriginal rights, including aboriginal rights to the use of land, in the context of the entrenchment of aboriginal rights in section 35 of the Constitution. Since that entrenchment the topic of aboriginal rights has become a constitutional issue as well as a matter of "property" law, and therefore we will be looking at this material by combining the property law and constitutional law courses. The final major case that we will deal with, *Delgamuukw*, brings together the common law of aboriginal title and the constitution (s. 35).

Reference has been made above to both aboriginal title and aboriginal rights. The former is now seen as one form of aboriginal right. It represents "the way in which the common law recognizes aboriginal land rights". That is, "aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land": *R.* v. *Van der Peet*. In this definition from the Supreme Court of Canada, therefore, "aboriginal rights" is a general term, and "aboriginal title" is a specific instance of an aboriginal right. However, we will see a little later that "aboriginal rights" is, confusingly, also a term that refers to specific rights, less than "title" - for example, a right to hunt or to fish.

Before reading the cases, three general points should be borne in mind.

First, the nature and extent of aboriginal rights described here are the rights recognized by the Canadian legal system. This is not necessarily the set of rights to

which the indigenous peoples themselves claim to be entitled.

Second, aboriginal rights are rights which indigenous peoples possess which are not possessed, and cannot be possessed, by non-native persons.

Third, in this chapter the term aboriginal rights does not refer to treaty rights. The rights discussed here arise independent of any treaty.

****

B) ABORIGINAL TITLE AT COMMON LAW: THE PRE-SECTION 35 CASES

A short description of aboriginal title would go as follows:

i) The absolute, or "radical", title to all land within the state, including land over which any aboriginal title or right may exist, belongs to the Crown. This "radical" title is the ultimate Crown title out of which the estates which we have studied are carved.

ii) Aboriginal title is a burden on this radical or absolute title, giving aboriginal peoples rights in the land.

iii) Having stated proposition (ii), courts traditionally (pre-*Delgamuukw*) had difficulty stating precisely what aboriginal title is. It was clearly established that it was not an estate held in tenure from the Crown. It is was equally not a purely personal "usufruct" interest (a right of use) held by individual aboriginal people. The most detailed assessment of what aboriginal title is comes in the *Delgamuukw* case, which we will read later. The early cases discussed in this section give you very little sense of the content of aboriginal title, but they are important for establishing that it does exist in the common law.

CHAPTER TEN

INTRODUCTION TO LANDLORD AND TENANT LAW:

THE NATURE OF THE LEASEHOLD RELATIONSHIP

A) INTRODUCTION

The principal characteristic of the landlord-tenant relationship at common law is that the leasehold interest is conceived of as an estate in land. While the relationship of landlord and tenant is created by contract, the relationship itself is not a contractual but a property relationship. In this sense it is the same as the relationship between a buyer and seller of land; they may contract to buy and sell, but once they have done so they are not in a continual contractual relationship that may modified by negotiation or even breached. The buyer has an estate and can exclude the seller; dealings between the two are at an end.

So too in the classical conception of the leasehold estate. Once the tenant has the lease he or she has an estate and the absolute right to exclusive possession against all the world, including the landlord, for so long as the term of the lease provides. All the landlord has is the reversion - the right to retake possession and full rights when the tenant's estate is at an end.

The landlord-tenant relationship is thus a relationship created by contract, express or implied, in which a person with an interest in real property - the landlord or lessor - grants a lesser interest in that property to the tenant or lessee. The technical term for lease is demise, and the leased land is often referred to as the "demised premises". The lesser interest demised is that of exclusive possession of land for a definite or potentially definite period of time. A leasehold estate cannot be of uncertain duration.

The remainder of this chapter expands on the point that a lease confers an estate in land, not merely certain contractual rights and obligations, by examining the distinction between leases and licences, the doctrine of the independence of covenants, and the legal consequences that flow from physical abandonment of the demised premises by the tenant.

This chapter deals with the common law of landlord and tenant. The common law has now been superseded in the area of residential tenancies by statutory reform. Only minor statutory changes have affected non-residential tenancies, which are therefore still largely governed by traditional common law principles. Thus the principles of law discussed in this chapter and the next concern commercial, or non-residential, tenancies only.

****

B) LEASES AND LICENCES

It is one thing to say that a lease is the grant of a leasehold estate, but knowing that will not tell you whether a particular agreement constitutes a lease or some other arrangement between the parties over use of land. The most common "other" legal form to an alleged lease is a licence, which is simply permission to use land for some purpose. If you let somebody park in your driveway, for example, you have granted them only a licence. Knowing which of the two has been created in any agreement is often vital, for at common law a licence is revocable at any time by the licensor. [Equity will enforce a contractual licence, one in which consideration has been paid, but even then it is effectively revocable provided damages are paid.]

An obvious example of an agreement that could be a lease or a licence, and of the importance that flows from deciding which is involved, comes from thinking of a superintendent in an apartment building. He or she works for the owner and usually lives in one of the apartments. If the agreement to occupy the apartment was construed as being only a licence, as but one term of many in the contract of employment and given in order to make it easier to carry out the terms of employment, the superintendent would have no legal protection outside any terms contained in the licence, the contract. If the same agreement to occupy was seen as a lease, and therefore completely independent of the employment relationship, the superintendent could claim whatever protection the jurisdiction's legal regime chose to give to tenants, whether or not he or she continued to work for the owner. As it happens, this situation is largely covered by a provision of the Residential Tenancies Act in Ontario, but the example should help to point up the significance of the lease/licence distinction.

relinquish any control by the appellant to the landlord; indeed to the contrary, they assure the appellant's exclusive possession and assure its control and occupancy. In the circumstances, I hold that the document was intended to and did in fact confer upon the appellant exclusive possession and exclusive control of the demised premises. Under this agreement the landlord had no right to possession and no right to control of the demised premises. Conversely, the appellant alone had these rights and with them all of the obligations and liabilities of a tenant. The document is a valid lease and the defendant has breached it as alleged....

In the result, then, the appeal is allowed....

****

NOTES

1) In recent decades there has been much litigation in the English courts over the lease/licence test, principally because English statutes protecting tenants' rights apply only when the tenant has a "lease". Landlords sought to evade these statutes by giving tenants what they referred to as "licences". The leading case is *Street* v. *Mountford* [1985] A.C. 809 (H.L.). Mr. Street rented a room to Mrs. Mountford pursuant to an agreement which gave her the right to exclusive possession. Throughout this agreement the word "licence" was used to refer to it: for example one clause stated that "an initial deposit equivalent to 2 weeks licence fee will be refunded on termination of the licence...." Street argued, in the words of Lord Templeman, for the following proposition of law: "an occupier granted exclusive possession for a term at a rent may nevertheless be a licensee if ... there is manifested the clear intentions of both parties that the rights granted are to be merely those of a personal right of occupation and not those of a tenant". The House of Lords rejected this argument, and largely ended a long-running controversy in English law in this area, by holding that exclusive possession for a term at a rent creates a tenancy in the absence of special circumstances. Such special circumstances would include, for example, accommodation that went with a job, such as caretaker's premises, but they could not include statements of apparent intention by the parties that their agreement be a licence: "the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent". In a now famous metaphor Lord Templeman stated: "The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade".

2) Two recent Canadian cases reveal some inconsistency. In *Read Marketing Inc.* v. *Minister of Transportation and Highways* (1995), 56 L.C.R. 55 (B.C. Expropriation Compensation Board) the plaintiff operated a gas station and convenience store under an agency agreement with an oil company, which itself leased the premises from the owner. The ministry acquired the land from the owners, and made an agreement with the oil company. The plaintiff argued that it was entitled to compensation. Whether it did so depended on whether it was an "owner" of land according to the definition in the Highway Act, which in turn depended on whether it was "a person having an estate, interest, right or title in or to the land". If the agreement to occupy was a lease, it would do so. If it was a licence, it had no such estate or interest. After reviewing the terms of the agreement the Board concluded that its "dominant objective" was to enable gas to be sold. It then noted that "nowhere is the agency agreement described as a lease". In fact it was referred to as conferring "an entitlement to occupy", and as discussing "occupancy costs" and "licence fees", not rent. The oil company also reserved the right to change the licence fee at any time, merely by notifying the plaintiff. Indeed, the agreement gave the oil company a "pervasive" right to control the premises. It specified hours of operation, what kind of advertising was to be used, how sales displays should be mounted, and that the company could enter at any reasonable time and inspect. Finally, the Board noted that the agreement to occupy was stated to be personal and non-assignable. It concluded: "the foregoing provisions are indicia of an agreed arrangement ... in the nature of a licence rather than a lease. They point to a personal contractual relationship through which the claimant can ... exercise a personal privilege to occupy premises." The Board said that the law was that "the language employed by the parties" was "compelling evidence as to the true nature of the relationship which they seek to form", and therefore this was a licence.

In an Ontario case, *Neda Rahimi* v. *Regional Assessment Commissioner Region No. 9*, Unreported, General Division, 29 January 1997, the issue was whether someone was liable for property tax, which in turn depended on whether an agreement between an individual and a church was a lease. Lax J. said that *Street* v. *Mountford* "establishes the test for a tenancy at common law", which was that "if the agreement confers on the occupier exclusive possession, this is *prima facie* a grant of an interest in land". That is, *Street* "stands for the proposition that while the parties may call it otherwise, the grant of exclusive possession is the singular distinguishing feature between a license and a lease".

NOTES

1) In chapter eleven we will revisit the issue of the rights and duties of landlord and tenant on abandonment of the premises by the tenant. For now, consider whether the judgment of the Supreme Court in *Highway Properties*, in addition to allowing the landlord to sue for prospective damages, also imposed on the landlord an obligation to mitigate damages? If not, should it have done so?

2) Parts of the judgment of the Supreme Court in *Highway Properties* appear to support a broad application of contract doctrines to leases. Yet the actual change in the law which resulted from the case was a small one, and the court certainly did not explicitly state that leaseholds generally should be governed by contract law. In a number of cases since then other courts have appeared to move other aspects of landlord-tenant law to a more contractual basis. For example, a recent decision of the British Columbia Court of Appeal appears to undermine the rule on the independence of covenants. In *Lehndorff Canadian Pension Properties Ltd. et al* v. *Davis Management Ltd. et al* (1989), 59 D.L.R. (4th) 1 (B.C.C.A.) Lehndorff owned an office building in Vancouver and Davis leased several floors in the building. Davis decided to move out and assigned its leases to a third party. These leases contained the following covenant:

10.02 The Tenant covenants that it will not assign or sublet without leave, which leave the landlord covenants not to withhold unreasonably as to any assignee or sublessee who, in the Landlord's judgment, has a satisfactory financial condition, has a good reputation in the business community and agrees to use the Demised Premises for purposes satisfactory to the Landlord.

Lehndorff refused consent to the assignments, and Davis terminated the leases. Lehndorff sued for the remainder of the rent due under the leases, but lost. In the Court of Appeal Carruthers J.A., with whom Toy J.A. concurred, upheld the finding of the trial judge that the refusal to consent to the assignments was unreasonable. There remained the issue of whether this gave Davis the right to terminate or merely to sue for damages. Carruthers J.A. rejected a suggestion that the landlord's action had amounted to constructive eviction and stated: "Rather than construe the Burrard leases as demises of real property, I would prefer to construe them as commercial contracts. In *Highway Properties* Laskin, J, in stating some general considerations respecting the interpretation of leases, said this (at p 721): 'It is no longer sensible to pretend that a commercial lease, such as the one before this court, is simply a

conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may he associated with an estate in land'. The somewhat unique factual situation of this case compels me to construe the Burrard leases, at time of termination thereof, as a commercial contract in accordance with the usual principles of contract law. Accordingly, I turn to the question whether the "Leave Required" provisions of s. 10.02 constituted a fundamental term of the Burrard leases so that breach thereof would amount to fundamental breach of contract."

An examination of the context persuaded the judge that a fundamental breach of contract had occurred when permission to sublet was refused. Therefore "DML would not be limited to a remedy in damages and would not be liable to Lehndorff for further rent".

Other British Columbia decisions have taken the same line. Shortly after *Lehndorff* the same court decided *Wesbild Enterprises Ltd.* v. *Pacific Stationers Ltd* (1990), 14 R.P.R. (2d) 25 (B.C.C.A.). The lease provided that the tenant, a store in a shopping centre, was to ship goods and receive deliveries only from a space so designated by the landlord, and that the landlord could make alterations to the mall provided that the tenant gave written consent where such alterations "substantially altered" the tenant's "ingress and egress to the Premises". For a while the tenant used a convenient loading bay at the back of the store for deliveries, although that area was never designated by the landlord for the purpose, but then the landlord made renovations which prevented this. In a number of ways deliveries became difficult and inconvenient, and the tenant left. The Court of Appeal decided without difficulty that the landlord had breached the lease covenant to obtain the tenant's permission for alterations which affected access. It then held that in the circumstances, particularly the circumstances of the kind of business operated by the tenant, the changes in access arrangements "were so fundamental to the way the business was conducted that, the landlord having been in breach of its agreement, the tenant was no longer required to continue with the lease and was entitled to elect to regard it as having been terminated by the landlord".

A variety of other British Columbia cases apply these principles.

3) There are many fewer cases from other provinces that have taken this approach. Most courts continue to adhere to the doctrine of the independence of covenants: see for example *461 King Street West* v. *418 Wellington Parking* (1992), 40 R.P.R. (2d) 220 (Ont. G.D.). But two decisions are of interest. In *Arton Holdings Ltd* v. *Gateway Realty Ltd* (1991), 106 N.S.R. (2d) 180 (N.S.S.C.-T.D.); affd. (1992), 112 N.S.R. (2d) 180 (C.A.), Gateway leased a store in its shopping centre to Zellers. Arton, a rival mall owner, lured Zellers to its shopping centre, and itself took an assignment of the lease held by Zellers in Gateway's mall. At the time that it did this Arton agreed to find a replacement tenant for the space vacated by Zellers, and the Court of Appeal found that this agreement was in effect an amendment to the lease. Arton failed to use its best efforts to get the replacement, probably because it preferred to leave its rival mall with a large empty space. Although Arton continued to pay rent to Gateway, the court forfeited the lease, holding that Arton had breached a "fundamental term" of the lease. This allowed Gateway as landlord to retake possession and rent to another store. Arton's failure "had the effect of literally destroying the viability of Gateway's ... Shopping Centre, contrary to any expectation in the original lease", and, as a result "the deteriorating situation ... became intolerable".

4) Another case employing *Highway Properties* to import contractual principles into leases is *Homer* v. *Toronto Dominion Bank* (1990), 83 Sask. R. 300 (C.A.). The tenant bank went into the premises under the terms of a written offer to lease. Although a formal lease was never signed, both parties and the court accepted that a binding ten-year lease was in effect. Following a dispute about whether a formal lease should be signed, the tenant bank stated that it was terminating the existing lease, and left. The trial judge found that as the lease contained no provision for early termination, the action of the bank was improper and it was liable for damages for the unexpired portion of the lease. On appeal Sherstobitoff J.A. held that the trial judge had "overlooked entirely the applicable principles of contract law". He found that correspondence from the landlord demanding that the tenant either sign the new lease or leave represented "an anticipatory breach or repudiation", a repudiation which the tenant accepted. Since, in his view, *Highway Properties* had accepted that the doctrine of anticipatory breach applied to landlord-tenant relationships, the matter was simply one to be dealt with under the applicable principles of contract law.

Note the ease with which the court saw this as a contract matter, not a property question. Does *Highway Properties* support this approach?

CHAPTER ELEVEN

LANDLORD AND TENANT OBLIGATIONS AND REMEDIES

A) INTRODUCTION

The rights and obligations of landlords and tenants are of three types: those implied by the common law, those that can be negotiated between the parties, and those imposed by statute. This chapter deals variously, although incompletely, with all three categories.

Sections (b), (c), and, to a much lesser extent (d), below, deal with the first category - obligations imposed by the common law. Most of this material concerns obligations on landlords. These "implied obligations" arise from the fact of the relationship itself, not from any agreement between the parties. They are invariably expressly included in leases anyway, either through an agreement to adopt the "usual clauses" of the jurisdiction or through express inclusion of, for example, a covenant for quiet enjoyment. Implied terms will yield to express ones covering the same subject matter.

There are two principal implied terms which put obligations on the landlord - the covenant for quiet enjoyment and the covenant for non-derogation from grant. These are dealt with in parts (b) and (c) of this chapter.

Part (d) considers the circumstances in which there is also an implied covenant that the demised premises be fit for use.

Parts (e), (f), and (g) examine various issues related to the principal obligation on the tenant - to pay rent.

the part of the landlords or some persons authorized by them by their actually entering upon or invading the premises or say by the irruption thereon of water emitted from the landlords' premises elsewhere. In my judgment, that submission is not justified by the authorities.... Concluding, therefore, as I do, that in this case the judge was entitled to find as a fact that the interference was substantial and that there was no principle of law which disqualified him from concluding as he did, I think that this appeal must fail and should be dismissed.

Romer L.J. I also agree, and have very little to add. I think it has become quite well established by the authorities that no act of a lessor will constitute an actionable breach of a covenant for quiet enjoyment unless it involves some physical or direct interference with the enjoyment of demised premises. In regard to that, I think that Mr. Dewhurst was right when he said that, in considering whether the enjoyment of premises has been disturbed, one looks to see what the purposes were for which the premises were granted. In a case such as the present, where the premises were demised for the use of a retail shop, the question is as to whether there has been an interruption or disturbance by the lessor of the enjoyment of the premises in relation to that purpose.

The question whether or not there has been such a physical or direct interference with the enjoyment of the premises has been decided here by the judge on the facts in favour of the plaintiff. I am bound to say that I entirely agree with him. One has a very good picture of what is being done from the photographs, which show the scaffolding which was put up and which show that there was an interference with the access to the shop premises by anybody who desired to enter them.

****

NOTES

1) A landlord is not responsible under this covenant for the actions of another tenant. See on this point *Malzy* v. *Eichholz,* [1916] 2 K.B. 308 (C.A.). The plaintiff leased a restaurant which was part of a block of shops and offices owned by the defendant. An adjoining part of the block was let to a third party who created a nuisance for the restauranteur. The landlord was not liable so long as he did not participate in the action creating the nuisance.

2) Denying exclusive possession includes denying one or more of its incidents. In *Cunningham* v. *Whitby Christian Non-Profit Housing Corp* (1997), 9 R.P.R. (3d) 210 (Ont. G.D.) the tenant occupied assisted housing. She dated another tenant, who was a "problem" tenant and who eventually moved out. But he still saw her, and on occasion stayed overnight. The tenant's lease contained a clause restricting occupancy of her apartment to her and her young son. The landlord wrote to her to say that while she could have an occasional overnight guest, they were concerned that the boyfriend was more than that. Later it sent the boyfriend a notice prohibiting him entry to the complex and threatened him with trespass proceedings if he did so. The court found that the letters warning about occupancy were not a breach of the covenant, but an attempt to prevent a tenant inviting a particular person to her apartment was a breach. The landlord could bar a person who was not a tenant, but could not do so if that person was an invitee of a tenant.

3) *Owen* v. *Gadd* represents the traditional position that the interference by the landlord need be direct and physical, and that disruption of comfort through noise, threats by the landlord, etc were not covered by the covenant for quiet enjoyment. A Canadian application of this position is *Franco* v. *Lechman* (1962), 36 D.L.R. (2d) 357 (Alta. C.A.). Premises were leased for use as a coffee, tobacco and candy shop. The building was sold before the lease expired, and the new landlord embarked on a course of action presumably intended to drive the tenant out. He refused the rent cheques, issued a notice to vacate based on non-payment of rent, created scenes in front of customers, and tried to prejudice the tenant's Italian customers against him. The tenant won at trial on a claim of breach of the covenant for quiet enjoyment, and the landlord appealed. Kane J.A. said at pp. 360-361:

"Where the ordinary and lawful enjoyment of demised premises is substantially interfered with by acts of the lessor, the covenant is broken although neither title to nor possession of the premises may be otherwise affected....The interference must be some physical interference with the enjoyment of the demised premises and a "mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy, or otherwise is not enough". In my opinion, there was a physical and substantial interference by the appellant with the enjoyment by the respondent of the demised premises for the purposes for which they were demised, that is operating a coffee counter and sale of confections and tobacco. In arriving at this conclusion I do not consider that the giving of a notice to vacate in itself constituted

a breach of the covenant. It is clear from the evidence of the respondent that he did not treat it as a valid notice and because of it vacate the premises. But the fact that the notice was given is evidence of the determination to endeavour to force the respondent to vacate and this, together with the other evidence accepted by the trial Judge, makes it plain that the appellant by his actions breached the covenant."

Franco states that attempting to drive the tenant out breaches the covenant, and that doing so meets the requirement that the landlord's interference by "physical". A similar case is *Kenny* v. *Preen*, [1962] 3 A11 E.R. 815 (C.A.), in which the landlord was held to have breached the covenant by threats of physical eviction, statements that he would remove the tenant's belongings, and by a campaign of harassment (banging on her door, shouting etc) designed to get her to leave. But the basis of the decision is unclear - it states both that there was a physical interference and that there was no need for one. The court stated: "The implied covenant for quiet enjoyment is not an absolute covenant protecting a tenant against eviction or interference by anybody, but is a qualified covenant protecting the tenant against interference with the tenant's quiet and peaceful possession and enjoyment of the premises by the landlord or persons claiming through or under the landlord. The basis of it is that the landlord, by letting the premises, confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right of possession during the term. I think the word "enjoy" used in this connexion is a translation of the Latin word "fruor" and refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it.

I would decide on two grounds in favour of the tenant's contention that there was, in this case, a breach of the covenant for quiet enjoyment. First, there was a deliberate and persistent attempt by the landlord to drive the tenant out of her possession of the premises by persecution and intimidation, and intimidation included threats of physical eviction of the tenant and removal of her belongings. In my view that course of conduct by the landlord seriously interfered with the tenant's proper freedom of action in exercising her right of possession, tended to deprive her of the full benefit of it, and was an invasion of her rights as tenant to remain in possession undisturbed, and so would in itself constitute a breach of covenant, even if there were no direct physical interference with the tenant's possession and enjoyment. No case of this kind has ever been considered by the courts before, and I do not think that the dicta in the previous cases should be read as excluding a case of this kind where a landlord seeks, by a course of intimidation,

to "annul his own deed", to contradict his own demise, by ousting the tenant from the possession which the landlord has conferred on her.

Secondly, if direct physical interference is a necessary element in the breach of covenant that element can be found in this case to a substantial extent, as I have already stated."

4) A variety of other cases show the expansion of the covenant in recent decades. In *McCall* v. *Abelesz*, [1976] 1 All E.R. 727 (C.A.) the landlord refused to pay utility bills, and as a result the gas, water and electricity were cut off. Denning L.J. stated that the covenant for quiet enjoyment "is not confined to direct physical interference from the landlord", and that "it extends to any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as tenant". Authority for this was given as *Kenny* v. *Preen*. More recently, the English Court of Appeal has held that a great deal of continuous noise, in and of itself, constitutes a breach of the covenant: *Southwark London Borough Council* v. *Mills*, [1999] 2 W.L.R. 409 (C.A).

A series of recent Ontario cases have also considerably widened the scope of this covenant. A substantial "invasion" of dust and dirt caused by the landlords' renovations to neighbouring premises was held to constitute a breach of the covenant for quiet enjoyment in *Amadon Properties Ltd* v. *Pacific Apparel Inc* (1990), 13 R.P.R. (2d) 186 (B.C.S.C.). A "retrofit" of the entire building by the landlords, which meant that everything was torn out and altered, represented a breach of the covenant for quiet enjoyment: *116531 Canada Inc.* v. *569562 Ontario Inc.* (1995), 47 R.P.R. (2d) 81 (Ont. G.D.).

It seems reasonable that the covenant should be expanded as it has been in these cases. That is, it makes little sense to say that noise is or is not a breach, but to ask whether there is a significant interference with the tenant's right to exclusive possession and all that entails. However, one can find cases where the covenant has been arguably stretched too far. An example from Ontario is *Mayfair Tennis Courts Ltd.* v. *Nautilus Fitness & Racquet Centre Inc.* (1999), 23 R.P.R. (3d) 271 (Ont. G.D.) The landlord, which wanted to move into the same business as the tenant, solicited the tenant's members to join its fitness club. Juriansz J. cited *Watchcraft Shop Ltd.* v. *L & A Development (Canada) Ltd.* (1996), 49 C.P.C. (3d) 17 (Ont. G.D.) for the following proposition: "the requirement that the interference be direct and physical continued

until fairly modern times.... However, the more current view, and one with which I am in agreement, is that any act by a landlord which is an interference with the tenant's ability to use the premises for the intended purposes, may constitute a breach of the right to quiet enjoyment". He then held that interference with membership was an interference with the business, and that the landlord had thereby breached the covenant for quiet enjoyment.

This last case seems a very substantial amendment to the common law, going as it does to profitability, especially given what is said below about the scope of the covenant for non-derogation from grant.

In my judgment, the decision [in O'Cedar] ... applies, and governs the present case. I am unable to hold that it was within the reasonable contemplation of the plaintiff and defendants that the defendants were putting themselves and their remaining property under such an obligation to the plaintiff as that contended for by her. For these reasons, I think that the action fails, and must be dismissed with costs.

****

NOTES

1) The rule that it is not a derogation from grant for a landlord to permit competitive enterprises in neighbouring premises was confirmed in *Clark's Gamble of Canada Ltd.* v. *Grant Park Plaza Ltd.* (1967), 64 D.L.R. (2d) 570 (S.C.C.). Spence J. said at pp. 579-580: "In the present case, the landlord, whether it be considered to be Grant Park Plaza Ltd. or either of its subsidiary companies, does not propose to utilize any part of the balance of its land in a fashion which would result in any part of the lands leased to the appellant being rendered unfit for doing business. It proposes to erect a building more than twice the size of that leased to the appellant and lease the said building to the F.W. Woolworth Company for the carrying on of a Woolco store. It is true that one could only expect the operation of the Woolco Store to be stern competition for the appellant. But this is far from conduct which would render the premises leased to the appellant unfit for it to carry on its business. To adopt the words from *Browne* v. *Flower*, "After all, a purchaser can always bargain for those rights which he deems indispensable to his comfort". Certainly the responsible officers of the appellant were well aware of the rights and interests of their employer. They had had long experience in both merchandising and leasing and would have found it a matter of no particular complication whatsoever to have drafted and insisted on a clear and exact covenant against leasing to a competing enterprise."

2) A similar case to Port is *Caplan et al* v. *Acadian Machinery Ltd.* (1976), 70 D.L.R. (3d) 383 (Ont. Div. Ct.). Caplan leased premises to Acadian in 1972, the lease providing that the tenant would pay for maintenance of the heating equipment and for insurance. Caplan then leased the adjoining premises to another tenant, whose business was of a nature that caused the insurance premiums on Acadian's property to rise. Acadian refused to pay the insurance, arguing that Caplan had derogated from its grant. Caplan won at trial. The Divisional Court judgment on

appeal is a short oral one, Holland J. stating that: "We are all of the view that the action of the landlord in the circumstances set out above ... was not a derogation from its grant".

What distinguishes *Caplan* from *Harmer*? Would it have made a difference if the insurance company had refused all coverage, not just raised the premiums? Should it?

3) A recent English case appears to expand the covenant in ways inconsistent with *Port* et al. In *Chartered Trust Plc* v. *Davis* [1997] 49 E.G. 135 (C.A.), both a specialist store in a small mall and the mall itself had failed. The English Court of Appeal found that the landlord had both committed a nuisance and derogated from grant by renting one of the stores to a pawnbroker. The pawnbrokers' customers apparently cluttered up the mall, frightened shoppers away, and to some extent made access to the plaintiff's shop difficult. The Court said that the landlord was responsible for these problems by letting out the store to the pawnbrokers, and that doing so constituted a derogation. While one commentator has argued that the case "will breathe new life into the implied term," one wonders if class bias affected the decision. Should the presence of down at heel customers be considered a sufficient ground for derogation, even if it was indeed true that they kept customers away from fancier stores? What if the evidence showed that it was the presence of a Caribbean take out restaurant and its customers, or a gay bookstore, which was disliked by customers?

NOTES

1) In *Davey* v. *Christoff* Meredith C.J.O. was content to adopt the rules laid down in the 1840s English cases cited in the judgment. Yet note that he also states: "In a climate such as that of Ontario there can be no doubt, I think, that if there were no adequate heating appliances in a furnished house intended to be heated by steam or hot water or air, and let for a period covering the winter months, the house would he unfit for human habitation within the decision in *Smith* v. *Marrable*". Why furnished only? If "local circumstances" are relevant, why would he not have used them for a broader holding? Fitness for use in residential tenancies is now generally covered by legislation. The relevant Ontario provision will be examined in chapter 12.

2) The distinction drawn by the common law between furnished and unfurnished premises has been adopted by all Canadian common law jurisdictions. See, *inter alia, Re Trella and Anko Investments Ltd.* (1981), 122 D.L.R. (3d) 713 (Alta. Q.B.). In that case Belzil J. stated that fitness for use must be covered by the terms of the lease in the case of unfurnished premises and that "a duty to repair defects that exist or which later arise will not normally be implied".

****

Even though there is no implied covenant of fitness for use at common law, the parties are always free to make an express one to that effect. But, as the following case shows, it will still be independent unless made a condition.

JOHNSTON v. GIVENS, [1941] 4 D.L.R. 634 (Ont. C.A.)

Robertson C.J.O.... The action is by a landlord for rent. By lease dated September 8, 1939, the plaintiff let to the defendant a suite in an apartment house on Chatsworth Drive, in Toronto, for the term of two years, to be computed from October 1, 1939, at a rental of $70 per month. The premises were expressly let for use and occupation as a private dwelling, for the sole occupancy of the lessee and his immediate family, and for no other purpose. The lease, which is made in pursuance of the Short Forms of Leases Act R.S.O. 1937, c. 159, contains many special covenants. Among them is a covenant by the lessor during the continuance of the term, between October 15th and May 1st in each year of the term to provide or procure to be provided, suitable means of heating, and furnish, or procure to be furnished, heat in the demised premises up to a reasonable temperature, for the reasonable use thereof by the lessee, in such manner as is possible with the existing heating

The rule is of general application that in default of any express provision to that effect the landlord's breaches of covenant do not entitle the tenant to declare the lease at an end. The landlord's covenant to heat the premises does not go to the whole consideration for the tenant's promise to pay rent. The tenant had still vested in him the interest in the premises created by the lease, and it cannot be said to be without any value for there are several months in each year in which the premises would be habitable notwithstanding the landlord's failure to supply heat. The term and the obligation to pay rent continue notwithstanding the landlord's breach of covenant. This is the principle established in Surplice v. Farnsworth, 7 Man. & G. 576, 135 E.R. 232: see the references to that case in Johnstone v. Milling (1886), 16 Q.B.D. 460 at p. 474, and Hart v. Rogers [1916] 1 K.B. 646 at p. 651....

The learned trial Judge dismissed a counter-claim of the respondent for "damages for moving costs, pain, suffering and inconvenience to himself and his family" arising from being forced to vacate the premises. The respondent has not appealed from that dismissal. It does not seem a satisfactory way to dispose of this case to compel the tenant to pay rent for the time he was out of occupation until the landlord re-let the premises, and to give him no redress for the landlord's breach of covenant. The tenant of a leased suite of apartments is in a difficult position if the landlord fails to heat them to a livable temperature. The tenant can no doubt refuse to enter into a lease that does not adequately protect him, and the Courts cannot make a new contract for him. Whether, in circumstances such as this respondent found himself in, the Court would find a case for a mandatory injunction against the landlord within the principle first laid down in Lane v. Newdigate, 10 Ves. 192, 32 E.R. 818, may some time have to be considered. The only remedy now available to this respondent must be in damages, and in my opinion that remedy should be left fully open to him notwithstanding the dismissal of the counterclaim. It should, therefore, be a term of the allowance of this appeal and of the judgment to be entered for the appellant, that there is reserved to the respondent any right to damages he may have had arising from the breach by appellant of any of the covenants in the lease.

There remains for consideration the amount of appellant's claim. In my opinion appellant is entitled only to rent up to the time when the premises were re-let. The act of re-letting put an end to the lease. In some of the textbooks it is said that there is an exception to the rule that the landlord cannot recover rent from the time of re-letting, in case the landlord gives notice to the tenant that he is re-letting solely on the latter's account.... No such notice was given in the present case, and the appellant is therefore not entitled to anything to compensate him for having re-let at a smaller rent.

NOTE: Commenting on this case, another judge stated that he found it "surprising" that the rule that covenants are independent was applied "to the breach of a covenant to supply heat in a country where premises are uninhabitable in winter without heat.... A right to damages, I may suggest, is cold comfort to the shivering tenant": *Macartney and Loma Industrial Products Ltd* v. *Queen-Yonge Investments Ltd,* [1961] O.R. 41 at 49-50 (H.C.).

purpose by the landlord, may, within thirty days next ensuing such conveying away or carrying off, take and seize such goods and chattels wherever they are found, as a distress for such arrears of rent, and sell or otherwise dispose of them in such manner as if they had actually been distrained by the landlord upon such premises for such arrears of rent.

48 (2) - No landlord or other person entitled to such arrears of rent shall take or seize, as a distress for the same, any such goods or chattels that have been sold in good faith and for a valuable consideration, before such seizure made, to any person not privy to such fraud.

49 - Where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant, the tenant's servant, or agent, or other person aiding or assisting therein, are or are believed to be in any house, barn, stable, outhouse, yard, close or place, locked up, fastened or otherwise secured so as to prevent them from being taken and seized as a distress for arrears of rent, the landlord or the landlord's agent may take and seize, as a distress for rent, such goods and chattels, first calling to the landlord's assistance a peace officer who is hereby required to aid and assist therein, and, in case of a dwelling house, oath being also first made of a reasonable ground to believe that such goods or chattels are therein, and, in the daytime, break open and enter into such house, barn, stable, outhouse, yard, close or place and take and seize such goods and chattels for the arrears of rent as the landlord might have done if they were in an open field or place upon the premises from which they were so conveyed or carried away.

50 - If a tenant so fraudulently removes, conveys away or carries off the tenant's goods or chattels, or if any person wilfully and knowingly aids or assists the tenant in so doing, or in concealing them, every person so offending shall forfeit and pay to the landlord double the value of such goods or chattels, to be recovered by action in any court of competent jurisdiction.

NOTE - The fraudulent removal provision was applied in *Park Street Plaza Limited* v. *Surinder Bhamber* (1992), 23 R. P R. (2d) 288 (Ont G.D). The court found that the tenant had indeed removed goods from the premises for the purpose of preventing the landlord from taking distress. The rent owed was a little less than $10,000, the value of the goods removed $25,000. The court then held that s. 50 gives no discretion: "it is a mandatory provision that the amount of the penalty shall be double the value of the goods or chattels, and I accordingly fix that particular penalty at the amount of $50,000."

53. Where any goods or chattels are distrained for any rent reserved and due upon any demise, lease or contract, and the tenant or owner of them does not, within five days next after such distress taken and notice thereof, with the cause of such taking, left at the dwelling house or other most conspicuous place on the premises charged with the rent distrained for, replevy the same, then, after the distress and notice and the expiration of such five days, the person distraining shall cause the goods and chattels so distrained to be appraised by two appraisers, who shall first be sworn to appraise them truly, according to the best of their understandings, a memorandum of which oath is

lease through forfeiture, is not entitled to any rental, accelerated or otherwise, past that date - in this case, October 2, 1979. If he has a claim for damages, he can make it, but in my view, the lease having been determined by his overt act, nothing can be claimed under the terms of the lease itself after the above date. Secondly, it would in my view be contrary to public policy to give full effect to the provision in art. 14.01 which states that the landlord will become the owner of the tenant's effects following re-entry onto the premises and I will not give effect to that clause. While the landlord may seize and sell as provided for in art. 14.05, it should retain no more than reasonably necessary to satisfy the arrears of rent. There should be a proper appraisal and the balance, if any, returned to the tenant. Otherwise, the ramifications of such actions by an unscrupulous landlord are obvious.

In summary, it is apparent that, while I agree with the learned trial Judge that there was an illegal distress per se, his order for return of all the goods taken and held by the appellants cannot stand. Goods and effects owned by the respondent may, as stated above, be retained, appraised and sold, but this applies only to sufficient goods to satisfy the rentals owing to the date of termination of the lease. It bears further emphasis as well that this right extends only to the interest of the tenant in those goods and effects. Obviously, goods wholly owned by the tenant may be retained, appraised and sold, but whether or not there exists any third party ownership or interest and the extent of any such legitimate interest must be ascertained and dealt with.

Gushue J.A. then reviewed the damages award made by the trial judge in favour of the tenant for the illegal distress. He concluded that "even had I agreed with the learned Judge that the appellant had illegally detained the goods, I would have found that the award made was excessive." He awarded damages of $2,000 for the illegal distress.

NOTE: In recent years there has been a line of cases in the Ontario courts that have allowed landlords to "secure the premises" to take distress without saying that their actions constituted a re-entry and thus a forfeiture. The most far-reaching of these is *Falwyn Investors Group Ltd* v. *GPM Real Property (6) Ltd.* (1998), 22 R.P.R. (3d) 1 (Ont. G.D.), in which the landlord changed the locks of the premises. The Court held that this was not a forfeit of the lease, because the landlord's agent also posted a notice to the effect that he had the key and on request would let the tenant in and lock up after he had left. Has not the tenant been denied exclusive possession? Is not the lease thereby converted into a licence?

opinion that in determining whether or not its discretion shall be exercised in the form of granting relief to a tenant whose lease has been forfeited by reason of default on payment of rent for a period exceeding 15 days, the Court can and should take into account all of the relevant circumstances surrounding the lessor-lessee relationship, including any evidence relating to breaches of other covenants in the lease, both past and still existing, of which the tenant has or ought to have knowledge: Lane v. Kerby (1920), 19 O.W.N. 381.

In the present case, I find that the tenant has been, and still is, in breach of the covenants relating to repairs and alterations, the covenant not to assign or sublet without leave, and the covenant not to remove goods from the demised premises. In addition thereto the tenant was, at the date of re-entry by the landlords, in breach of the covenant to pay rent and to pay taxes. With respect to the payment of rent, he has persisted in late payment of same as referred to earlier, notwithstanding repeated requests for prompt payment. The matter of default in payment of taxes was brought to the tenant's attention long before the re-entry. The tenant chose to ignore the landlords' warning in that regard. In addition to all of the aforesaid matters, the tenant has moved his business from the demised premises to a new place of business on the same street. This is not a case of hardship where a tenant is, as a result of a careless oversight or other reason, being forced out of the business for which he rented the premises.

The landlord's application was allowed.

NOTES

1) Relief was refused in *931576 Ontario Inc.* v. *Bramalea Properties* (1992), 24 R.P.R. (2d) 1 (Ont. G.D.). The tenant operated a restaurant and bar in the lobby of an office building. It started to provide live music, and this resulted in many complaints from other tenants. The landlord terminated pursuant to a clause in the lease which permitted termination if the quiet enjoyment of other tenants was affected. The tenant applied for but was denied relief. Montgomery J. noted that the tenant was given the opportunity to redress the problem but ignored complaints. Its "attitude" was "inappropriate", and its behaviour "reprehensible", while the breaches complained of were "persistent" and "substantial".

2) The equitable maxim that an applicant must come to the court with "clean hands" was applied in *Kochhar* v. *Ruffage Food Corp.* (1992), 23 R.P.R. (2d) 200 (Ont. G.D.). A sub-tenant in a franchise agreement was supposed to pay 7% of revenues to the principal tenant, its "landlord". The tenant believed, with some justification, that the sub-tenant was not reporting all revenues, and terminated as a result. The court denied relief because, as an equitable remedy, relief against forfeiture required the sub-tenant to have "clean hands".

In my view, the Highway Properties specifically preserves for the parties to a commercial lease the "full armoury of remedies ordinarily available to redress repudiation of covenants", and thus the measure of the appellant's damage is not limited by his election of remedy. The damages include the present value of unpaid future rent for the unexpired period of the lease and should be decreased by the actual rental value for the same period, whether or not there was a duty on the appellant to mitigate. In my opinion the Highway Properties case is the complete answer. It needs to be expanded only to the extent of giving the tenant the same access as was given to the landlord to the full range of contractual remedies and defenses. Once it is established that the subsequent transaction - the new lease - arises out of the consequences of the breach in the ordinary course of business, the landlord's abandonment of a claim for prospective rent should not have the effect of limiting the common law defences based on the fact of mitigation whereby any loss has been successfully avoided.

In my view, when damages are calculated on the basis of breach of contract, the distinction between rent accrued and prospective rent, or damages for other breaches of covenant, are unimportant, the calculation being directed at placing the plaintiff in the same position as he would have been if all the covenants had been performed. The appellant in this case had been made whole.

Appeal dismissed.

****

NOTES

1) What exactly does *Postal Promotions* decide? Some subsequent cases have stated that it found a duty to mitigate; is that correct?

2) A review of other cases on this issue shows a variety of approaches. Some courts have said there is a duty to mitigate, others that there is not but should be. In *Grouse Mechanical Co.* v. *Griffith et al* (1990), 14 R.P.R. (2d) 233 (B.C.S.C.) the tenant abandoned the premises and the landlord re-let, having given the new tenant an inducement of four months rent free. The landlord's damages claim included rent for those four months. Cowan J. stated: "Once the tenant breached his obligations or stated his intention to breach his obligations, the plaintiff had a duty to mitigate his loss". The duty could only be avoided in a situation in which the landlord had "substantial and legitimate interest in actual performance". Cowan J took this latter notion from *Asamera Oil Corp Ltd.* v. *Sea Oil and General Corp.* (1978), 89 D.L.R. (3d) 1 (S.C.C.), the most recent word from the Supreme Court about when an innocent party to a contract repudiation may be able to insist on performance rather than accept the repudiation, and there was no discussion in this part of the judgment of

any of the leading landlord and tenant cases on the topic. A recent Manitoba decision, *PensionFund Realty Limited* v. *P.C.E.P. Properties Ltd et al* (2004), 23 R.P.R. (4th) 297 (Man. Q.B.) also assumes the landlord has a duty to mitigate.

At odds with these cases is *Transco Mills Ltd.* v. *Percan Enterprises Ltd.*, unreported, [1993] B.C.J. No. 222 (B.C.C.A.). The court held that when a landlord keeps the lease alive "and claims for rent due", there is "no basis on which ... [it] can be required to mitigate its loss". Citing *Highway Properties*, the court held that the option of simply keeping the lease alive was one that the landlord was still entitled to take. The court was not persuaded that it should follow the advice of the province's Law Reform Commission, which had proposed a duty to mitigate in commercial tenancies (Law Reform Commission, British Columbia, *Report on the Commercial Tenancy Act* (1989)). It said: "If any such change in the law is to be made, it ought, in my view, to be made by the legislature, which is in a position to consider the full range of commercial interests at stake, rather than on the basis of the necessarily limited submissions of two parties to a lawsuit, and I would certainly not be prepared to take such a step in the present case".

3) In *Almad Investments* v. *Mister Leonard Holdings*, [1996] O.J. No. 4074 (C.A.) the Ontario Court of Appeal, in a brief one-page dismissal of an appeal from a summary judgment motion, cited *Highway Properties* for the proposition that "the landlord has no duty to mitigate".

4) One reason sometimes given for the traditional view that there is no duty to mitigate in these circumstances is that mitigation only applies to executory contracts, not executed ones. That is, consider the case of a contract for the supply of a particular good. Once the contract is executed and the goods delivered, there is as a practical matter no duty to mitigate because the property contracted for is in the possession of the transferee. Traditionally a lease has been viewed the same way, as an executed contract, with the goods - the right to exclusive possession for a term - passed on. But as Professor Weinrib points out, in fact the whole term has not been "executed", and in reality the lease is as much executory as it is executed: A. Weinrib, "Property, Precedent and Policy", (1985) 35 *University of Toronto Law Journal* 542 at 544-545.

CHAPTER TWELVE

RESIDENTIAL TENANCIES

A) INTRODUCTION

Since c. 1970 all Canadian jurisdictions have enacted separate statutory regimes for residential, as opposed to commercial, tenancies. These regimes vary from province to province. That of Ontario is now to be found in the *Residential Tenancies Act*, S.O. 2006, c. 17. This Act was passed in 2006 and was proclaimed in force on January 31, 2007. The *Residential Tenancies Act* is the second major reform of the Ontario law in the last decade. From 1998 until 2007 the relevant statute was the *Tenant Protection Act*, S.O. 1997, c. 24, in force as of June 17, 1998, the work of the Harris government. The *Tenant Protection Act* repealed the previous statute, Part IV of the *Landlord and Tenant Act*.

The various acts specifically about residential tenancies are not the only statutes that govern the area. Other statutes directly relevant include the *Human Rights Code* which prohibits discrimination in the provision of accommodation. Before the introduction of the *Tenant Protection Act* there was also separate legislation dealing with rent review/control and with protection of the rental housing stock. These were repealed by the *Tenant Protection Act*, ss. 218 and 219.

Residential tenancies law can obviously be set against the general background of some of the themes of this course - particularly the ideas that property is a bundle of rights and that the content of property regimes and the arguments supporting one or the other are matters of social choice. In Ontario a major set of changes to the common law were introduced in 1970, when Part IV was added to the *Landlord and Tenant Act*, incorporating many of the recommendations of the Ontario Law Reform Commission's *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1968). The security of tenure provisions of Part IV were introduced in 1975, and were largely retained in both the *Tenant Protection Act* and the current *Residential Tenancies Act*. Rent control/review was first introduced in the 1970s also, but has now been substantially modified (as discussed below).

The general thrust of the various legislative changes since the 1970s has been to make the conceptual basis of residential tenancies law different to that of commercial

tenancies in two fundamental ways.

First, while the commercial lease is still an estate, the residential lease is a contract for accommodation.

Second, while the terms of the commercial lease are largely a matter for the parties, a residential contract for accommodation is in significant ways a regulated contract; the power of the parties to make their own terms is substantially curtailed. This second point is somewhat less true of the current Ontario legislation than it was of the pre-1997 regime, in that the rent control regime has been changed. But it remains the case that the legislation in many other areas takes away the ability of the parties to bargain and substitutes imposed terms.

These two broad conceptual changes should inform your reading of both the articles (section B) and statutory provisions (sections C and D) reproduced below. As you read the latter, look for evidence of four general themes:

1) The legislation imposes obligations on landlords unknown to the common law. See here particularly the repair and fitness for use provisions - section C.

2) The legislation seeks to deal with the perceived inequality of bargaining power between landlords and tenants. See here the prohibition of "contracting out" and the elimination of landlords' "self-help" remedies - section C.

3) The legislation seeks to include all (or almost all) forms of "residential accommodation". See here the various definition and exclusion sections and consider them in the context of earlier material on the distinction between leases and licenses - section C.

4) The legislation provides substantial, though by no means complete, security of tenure, while also permitting termination of tenancies both for tenant "fault" and to recognise landlords' interests as property owners.

One very important change introduced with the *Tenant Protection Act* and continued with the *Residential Tenancies Act,* has been the establishment of an administrative tribunal to hear residential tenancies disputes, ousting the jurisdiction of the courts. Under the *Tenant Protection Act* this was called the Ontario Rental Housing Tribunal (ORHT); it is now called the Landlord and Tenant Board. The *Residential Tenancies Act*

states:

168 (1) - The Ontario Rental Housing Tribunal is continued under the name Landlord and Tenant Board .....

168 (2) - The Board has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.

174 - The Board has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under this Act.

210 (1) - Any person affected by an order of the Board may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law.

210 (2) - A person appealing an order under this section shall give to the Board any documents relating to the appeal.

210 (3) - The Board is entitled to be heard by counsel or otherwise upon the argument on any issue in an appeal.

210 (4) - If an appeal is brought under this section, the Divisional Court shall hear and determine the appeal and may,

(a) affirm, rescind, amend or replace the decision or order; or

(b) remit the matter to the Board with the opinion of the Divisional Court.

210 (5) - The Divisional Court may also make any other order in relation to the matter that it considers proper and may make any order with respect to costs that it considers proper.

211 - The Board is entitled to appeal a decision of the Divisional Court on an appeal of a Board order as if the Board were a party to the appeal.

The Act, as did the *Tenant Protection Act*, also contains mediation provisions:

194 (1) - The Board may attempt to mediate a settlement of any matter that is the subject of an application or agreed upon by the parties if the parties consent to the mediation.

194 (2) - Despite subsection 3 (1) and subject to subsection (3), a settlement mediated under this section may contain provisions that contravene any provision under this Act.

Tenant advocates were highly critical of the ORHT, especially as it operated in Toronto and during the tenure of the conservative administrations headed by Mike Harris and Ernie Eves. They complained that it was staffed by political appointees, and that it was much more responsive to landlords' interests than to those of tenants. In particular, they argued that it had done what then Housing Minister Al Leach promised in 1995 - make it much easier to evict tenants (*Globe and Mail*, 24 November 1995). Writing in 2001 Elinor Mahoney of Parkdale Community Legal Services stated that the Tribunal "had become a mechanism for Ontario landlords to dislocate tens of thousands of tenants from their rent-controlled apartments", in turn aggravating the homelessness problem ("The Tenant Protection Act - A Trust Betrayed", (2001) 16 *Journal of Law and Social Policy* 261 at 277. Certainly eviction rates substantially increased after the Tribunal was established. Tenant advocates attributed this to the economic incentives landlords now had to evict due to the partial abolition of rent controls (discussed below), and to the procedures for eviction (also discussed below). Against this it was argued that the *Tenant Protection Act* and the Tribunal simply made it easier for landlords to get rid of bad tenants. The changes made with the *Residential Tenancies Act* are clearly a response to some of these critiques.

We will revisit some of these issues as we go through the debates about security of tenure and rent controls, and then look at the legislation.

NOTE: In a number of cases under the predecessor legislation tenants resisted termination under the personal occupation section by challenging the landlord's good faith, and the decisions demonstrate that the courts are not very receptive to such an argument. In *Yarmuch* v. *Jacobson* (1985), 34 A.C.W.S. (2d) 145 (Ont. Dist. Ct.), for example, the tenant actually led evidence to show that the landlord had gone through the procedure before for another apartment and then re-let the premises. The court held that the application should not be dismissed merely on this evidence, but that it should be examined on its merits. While the previous proceeding meant that the court should look at the matter with some care, the issue was the good faith of the landlord in the current circumstances. Similarly, in *Wolfowicz* v. *Craig* (1986), 6 W.D.C.P. 162 (Ont. Dist. Ct.) a landlord was allowed to bring a second application after the first was dismissed for lack of good faith, on the grounds that new medical evidence related to an illness that came after the first hearing.

The issue of the landlord's good faith was also raised in *Salter* v. *Beljinac* [2001] O.J. No. 2792 (Div. Ct.). Beljinac had lived in the second floor apartment of a house for 24 years with Salter, the landlord, living on the main floor. Salter applied for termination on the grounds that he wanted his son, who was living in the basement apartment, to be able to move into the second floor apartment. The latter was larger than the basement, and Salter's son had a spouse and small child. Beljanic resisted the application, arguing that if it was partly motivated by economic considerations the Tribunal should refuse to grant it, even if part of the motivation was also genuine. Beljanic was paying $668 month, and an identical apartment in the adjacent building was renting, to a new tenant, for $1,400 a month. The landlord admitted that economic factors were an issue. He wanted to be able to offer his son cheap accommodation, but could not afford to do so by giving him another apartment in his other building and thereby having two apartments rented out at well below market rents. Both the Tribunal and the Divisional Court rejected the tenant's argument, the latter holding that all that mattered was the genuineness of the landlord's intention to move a family member into the particular apartment. That is, "the fact that the landlord might choose the particular unit to occupy for economic reasons does not result in failing to meet the s. 51 (1) standards".

Tenant advocates argue that in the years immediately following the abolition of rent controls for new tenants the personal occupation section was often used to get out long-standing tenants and let the apartment at a much higher rent. The Tribunal had no mechanism for checking to see if indeed a family member moved in; it is up to the displaced tenant to "police" what happens afterwards. In one of the very few cases

on this problem, under the old *Landlord and Tenant Act, McLarty* v. *Goudanos* (Unreported, Ont Prov Ct, Caswell DCJ, June 2, 1989), the landlord served a notice to tenants based on the personal occupation section, and then re-let the premises at a higher rent than he could have charged to the existing tenants. The tenants were awarded damages, based on the difference they would have paid and the higher rent they had to pay for their new premises, for a period of 4 months. Punitive damages were also awarded, in the sum of $600.

Under the previous legislation the courts resisted attempts to impose some sort of "reasonableness" requirement into the "conversion" section. As with personal occupation, only the genuineness of the landlord's intention will be assessed.

The *Residential Tenancies Act* seeks to provide some remedies for tenants who are the victims of landlord bad faith under both the personal occupation and demolition, conversion, renovation sections:

57 (1) - The Board may make an order described in sub-section 3 if, on application by a former tenant of a rental unit, the Board determines that,

(a) the landlord gave a notice of termination under section 48 in bad faith, the former tenant vacated the rental unit as a result of the notice, and no person referred to in clause 48 (1) (a), (b), (c), or (d) occupied the rental unit within a reasonable time after that termination;

(b) the landlord gave a notice of termination under section 49 in bad faith, the former tenant vacated the rental unit as a result of the notice, and no person referred to in clause 49 (1) (a), (b), (c), or (d) or 49 (2) (a), (b), c), or (d) occupied the rental unit within a reasonable time after that termination; or

(c) the landlord gave a notice of termination under section 50 in bad faith, the former tenant vacated the rental unit as a result of the notice, and the landlord did not demolish, convert or repair or renovate the rental unit within a reasonable time after that termination.

57 (2) - No application may be made under subsection (1) more than one year after the former tenant vacated the rental unit.

57 (3) - The orders referred to in subsection (1) are the following:

1. An order that the landlord pay a specified sum to the former tenant for,
i) all or any portion of any increased rent that the former tenant has incurred or will incur for a one-year period after vacating the rental unit; and
ii) reasonable out-of-pocket moving, storage and other like expenses that the former tenant has incurred or will incur.

2. An order for an abatement of rent.

3. An order that the landlord pay to the Board an administrative fine not exceeding the greater of $10,000 and the monetary jurisdiction of the Small Claims Court.

4. Any other order that the Board considers appropriate.

Can landlords use the personal occupation section to obtain a "second home"? See the following case:

JAFFER v. SACHDEV (1989), 6 R.P.R. (2d) 86 (Ont. D.C.)

Hoilett D.C.J.: This is an application by the landlords for a termination of the tenancy agreement and for a writ of possession grounded on the claim that the "landlord bona fide requires possession of [the] residential premises ... for the purpose of occupation by himself, his spouse or child", in particular for occupation by themselves (husband and wife) and their two youngest children Baseen and Mureen; ages 4, and 2, approximately.

The material facts in this application are not seriously in dispute and may be briefly summarized. The demised premises, 1435A Gerrard St. E., Toronto, is a one-bedroom apartment atop a restaurant, which is numbered 1435. The landlords have operated a vegetarian restaurant at that location since 1986, first as tenants of the building and later as owners, when they purchased the building in 1988. The tenants have been tenants of the demised premises since 1980 and were inherited by the present landlords when they purchased the premises in 1988. The landlords are the parents of 4 children, aged 12, 11, 4 and 2 years of age. Apart from the demised premises they own a 3-apartment complex at 42 Pape Ave., some 3 or 4 blocks from the demised premises, and a spacious 4-bedroom residence in Mississauga, which has served as the family residence for some time. Mr. Jaffer, who testified on behalf of the applicants, indicated that the rigours of running a specialty restaurant requires long hours, 6 or 7 days a week and the apartment atop the restaurant would provide a haven for him and his wife as well as for the couple's two younger children who are often around. Sleeping, when they have worked late into the night or into the wee hours of the morning, would become a realistic alternative to driving home to Mississauga. Mr. Jaffer confirmed in his evidence as well that there is a fenced in area adjacent to the restaurant building as well as a finished basement. Apart from the applicants, there are four employees serving at the restaurant.

The tenant, a 63-year-old widow shares the apartment with her son, Ravinden Kuman Sachdev, a refugee (or refugee claimant) who only recently was allowed to work because of the change in the Federal Government policy affecting the right of refugee claimants to work. As it appears from Mr. Sachdev's affidavit and his oral testimony, the tenant is a diabetic who suffers from angina. She speaks no English and depends for much of her social existence on the East Indian community which has a

61 (1)- A landlord may give a tenant notice of termination of the tenancy if the tenant or another occupant of the rental unit commits an illegal act or carries on an illegal trade, business or occupation or permits a person to do so in the rental unit or the residential complex.

61 (2) - A notice of termination under this section shall set out the grounds for termination and shall provide a termination date not earlier than,

(a) the 10th day after the notice is given, in the case of a notice under subsection (1) grounded on an illegal act, trade, business or occupation involving,
(i) the production of an illegal drug,

(ii) the trafficking in an illegal drug, or
(iii) the possession of an illegal drug for the purposes of trafficking; or
(b) the 20th day after the notice is given, in all other cases.

Note here s. 75, which codifies a long-established common law rule:

75 - The Board may issue an order terminating a tenancy and evicting a tenant in an application ... based on a notice of termination under section 61 whether or not the tenant or other person has been convicted of an offence relating to an illegal act, trade, business or occupation.

NOTE: Many of the reported cases on what is now s. 61 involve drugs, and in those cases the courts usually terminated tenancies as a result. There have been suggestions that there are constitutional problems with the current law on illegal activities and loss of shelter rights in public housing, but to date the courts have not heeded them: see M. Drumbl, "The State as Landlord: The Constitutionality of the Termination of Public Housing Leases on Account of a Tenant's Illegal Activities", (1996) 7 *Windsor Review of Legal and Social Issues* 75, and *MTHA* v. *Smith* (1989), 33 O.A.C. 349 (Div. Ct.). In *Smith* the MTHA sought to terminate the 10-year tenancy of Merleaner Smith, an unemployed single mother then attending school to upgrade her education to a grade 10 level. The reason for the application was that Smith's 24-year old son, Anthony Aransibia, who lived with her and her two other minor children, was trafficking in cocaine in the parking lots and roadways of the apartment building complex at Lawrence Heights. At the time of the application he was awaiting trial. There was no suggestion that Ms. Smith was in any way involved in the trafficking and she could not ask her son to leave because one of the conditions of his bail was that he not move. In an unreported judgment the trial judge allowed the application and held that: (a) Aransibia had committed an illegal act; (b) the illegal act had been committed on the residential premises, which involved common areas of the complex; and (c) Ms. Smith had "permitted" this act; she knew of it and was wilfully blind to it. Smith

NOTES

1) Compare the *Jaffer* facts with those of *Chin* v. Dejager (1988), 29 O.A.C. 372 (Ont. Div. Ct.) where the landlord wanted a second residence in order to spend as much time as possible with her daughter who had just undergone radical cancer surgery and who needed special care. The application was granted. Conversely, and similarly to Jaffer, in *Horst* v. *Beingessner*, 2002 Carswell Ont 5019, the tribunal granted relief for a tenant of 18 years standing although it accepted that the landlord was in good faith in wanting her father to move into the unit. The adjudicator held that the unit was not 'required' for personal occupation because other units in the building were available. Does this import into the relief application considerations properly belonging to the threshold substantive question?

2) The Tribunal's use of the relief against forfeiture power was critiqued in P. Rapsey, "See No Evil, Hear No Evil, Remedy No Evil: How the Ontario Rental Housing Tribunal is Failing to Protect the Most Fundamental Rights of Residential Tenants", (2000) 15 *Journal of Law and Social Policy* 45. Rapsey argued that in this area, and others, the tribunal did not use the full powers available to it. Relief was rarely granted, and some adjudicators seemed to believe that it should given only in exceptional cases. Rapsey and others have also contrasted the relief available to residential tenants facing eviction and that for commercial tenants and for home-owners who miss mortgage payments. Lending institutions use foreclosure and repossession as a last resort, largely because mortgage law has evolved to require them to do so.

3) In *Toronto Community Housing Corp* v. *Greaves* [2005] O.J. No. 1518 the Divisional Court held that a failure by a tribunal adjudicator to even consider whether it was applicable to grant relief constituted a legal error.